

ESSB 6143 - H AMD TO H AMD (H-5614.2/10) 1562

By Representative Santos

NOT ADOPTED 3/08/2010

1 On page 1, beginning on line 20, strike all of section 201 and
2 section 202 and insert the following:

3
4 "NEW SECTION. **Sec. 201.** A new section is added to chapter
5 82.32 RCW to read as follow:

6 (1) It is the intent of the legislature to require all
7 taxpayers to pay their fair share of taxes. To accomplish this
8 purpose, it is the legislature's intent to identify and prohibit
9 transactions, plans, and arrangements that are designed to
10 deceptively avoid taxes.

11 (2) The legislature directs the department to prepare a report
12 that identifies transactions, plans, and arrangements that are
13 primarily designed to deceptively avoid the payment of taxes. These
14 include a transaction, plan, or arrangement that:

15 (a) Disguises income received, or otherwise avoids tax on
16 income, from a person that is not affiliated with the taxpayer;

17 (b) Disguises the purchase or sale of property or services
18 from or to a person that is not affiliated with the taxpayer;

19 (c) Avoids the tax imposed by RCW 82.12.020 on the use of
20 property in the state that is owned by an entity organized outside
21 of the state;

22 (d) Is a sham transaction in fact or in substance;
23 is intended solely for tax avoidance purposes and lacks economic
24 substance;

25 (e) Elevates form over substance;

26 (f) Is completed in multiple steps, rather than a single
27 transaction, where the intent in using multiple steps is to avoid
taxation; or

1 (g) Assigns or transfers a taxpayer's earned income to another
2 person where the intent is to avoid tax.

3 (3) Beginning December 1, 2010, and by December 1 of each
4 subsequent year, the department must submit its report to the house
5 of representatives finance committee and the senate ways and means
6 committee, or their successors. The department may include draft
7 legislation to address the deceptive tax avoidance transactions,
8 plan, or arrangements identified in the report.

9 (4) The definitions in this subsection apply to this section.

10 (a) "Affiliated" means under common control;

11 (b) "Control" means the possession, directly or indirectly, of
12 more than fifty percent of the power to direct or cause the
13 direction of the management and policies of a person, whether
14 through ownership or voting shares, by contract, or otherwise;

15 (c) "Lacks economic substance" means having no purpose other
16 than to obtain a tax benefit where a participant's risk of profit or
17 loss is insignificant when compared to the tax benefit; and

18 (d) "Sham" means fictitious, deceptive, and fraudulent.

19 (5) The legislature specifies the following as transactions,
20 plans, or arrangements that may be primarily designed to deceptively
21 avoid the payment of taxes:

22 (a) A joint venture arrangement between a contractor required
23 to register under RCW 18.27.020 and an owner or developer of a
24 construction project when the arrangement: (i) provides for
25 guaranteed payments to the contractor for construction services; and

26 (ii) does not entitle the contractor to share in substantial
27 profits and bear significant risk from the project.

28 (b) (i) A parent/subsidiary organizational structure or
29 arrangement wherein the parent: (A) creates a subsidiary outside of
30 Washington; (B) provides services to customers outside of
31 Washington; (C) assigns out-of-state customer contracts to the out-
32 of-state subsidiary; (D) requires out-of-state customers to pay for
33 services to the out-of-state subsidiary; and (E) receives income

1 that represents payment for these out-of-state customer contracts
2 through a dividend or transfer from the out-of-state subsidiary.

3 (ii) A parent/subsidiary organizational structure or
4 arrangement described in this subsection (5) (b) will not be
5 considered primarily designed to deceptively avoid the payment of
6 taxes if the services provided to the customers outside Washington
7 are primarily performed by employees of the out-of-state subsidiary.

8 (6) The department may disregard any transaction, plan, or
9 arrangement that is specified in subsection (5) of this section,
10 except if:

11 (a) The taxpayer initiated the transaction, plan, or arrangement
12 before April 1, 2010; and (b) the taxpayer had reported its tax
13 liability in conformance with: (i) specific written instructions
14 provided by the department to the taxpayer; or (ii) a published
15 determination or any other document published by the department.

16 (7)(a) For purposes of subsection (6) of this section,
17 "specific written instructions" means tax reporting instructions
18 provided to a taxpayer which specifically identify the taxpayer to
19 whom the instructions apply. Specific written instructions may be
20 provided as part of an audit, tax assessment, determination,
21 closing agreement, or in response to a binding ruling request.

22 (b) Subsection (6) of this section applies to tax periods
23 beginning January 1, 2006, but does not apply to any tax periods
24 ending before April 1, 2010, that were included in a completed
25 field audit conducted by the department.

26 (c) Subsection (6) of this section must be construed narrowly
27 to ensure that only transactions, plans, or arrangements where
28 there is clear and convincing evidence of deceptive tax avoidance
29 are subject to tax liability."

30
31 On page 23, at the beginning of line 1, after "(6)" strike all of
32 the material through "department" on line 14 and insert the
33 following:
34

1 "If the department finds that all or any part of a
2 deficiency resulted from engaging in a disregarded transaction, as
3 described in section 201(2)(a), (b), (c), (d), (e), (f), and (g)
4 of this act, the department must assess a penalty of thirty-five
5 percent of the additional tax found to be due as a result of
6 engaging in a transaction disregarded by the department under
7 section 201(2)(a), (b), (c), (d), (e), (f), and (g) of this act.
8 The penalty provided in this subsection may be assessed together
9 with any other applicable penalties provided in this section on
10 the same tax found to be due, except for the evasion penalty
11 provided in subsection (7) of this section. The department may not
12 assess the penalty under this subsection if, before the department
13 discovers the taxpayer's use of a transaction described under
14 section 201(2)(a), (b), (c), (d), (e), (f), and (g) of this act,
15 the taxpayer discloses its participation in the transaction to the
16 department"

17
18 On page 23, on line 23, after "impose" strike "both" and insert
19 ((both))

20
21 On page 23, on line 24 after "penalty" strike "and" and insert
22 "((and)),"

23
24 On page 23, on line 25 after "instructions" insert ",_"

25
26 On page 23, beginning on line 32 of the amendment, strike all of
27 section 204 and insert the following:

28
29 **"Sec. 204.** A new section is added to chapter 82.32 RCW to read
30 as follow:

31 (1) The legislature finds that this state's tax policy with
32 respect to the taxation of transactions between affiliated
33 entities and the income derived from such transactions
34 (intercompany transactions) has motivated some taxpayers to engage

1 in transactions designed solely or primarily to minimize the tax
2 effects of intercompany transactions. The legislature further
3 finds that some intercompany transactions result from taxpayers
4 that are required to establish affiliated entities to comply with
5 regulatory mandates and that transactions between such affiliates
6 effectively increases the tax burden in this state on the
7 affiliated group of entities.

8 (2)(a) The department of revenue is directed to conduct a
9 review of the state's tax policy with respect to the taxation of
10 intercompany transactions. The review must:

11 (i) Include the impacts of such transactions under the state's
12 business and occupation tax and state and local sales and use
13 taxes;

14 (ii) Examine how this state's tax policy compares to the tax
15 policy of other states with respect to the taxation of
16 intercompany transactions; and

17 (iii) Analyze potential alternatives to the current policy of
18 taxing intercompany transactions, including their estimated
19 revenue impacts if practicable.

20 (b) In conducting this review, the department must seek input
21 from members of the business community and others as it deems
22 appropriate.

23 (c) The department must report its findings to the fiscal
24 committees of the house of representatives and senate by December 1,
25 2010. However, if the department has not completed its review by
26 December 1, 2010, the department must provide the fiscal committees
27 of the legislature with a brief status report by December 1, 2010,
28 and the final report by December 1, 2011."

29
30 Renumber the remaining sections consecutively and correct the
31 internal references accordingly

32
EFFECT: Requires the Department of Revenue (DOR) to prepare a
report each year that identifies transactions, plans and
arrangements that are designed to deceptively avoid the payment of

tax. Allows DOR to disregard transactions, plans and arrangements that are designed to avoid tax in two cases - joint ventures related to construction and parent/out-of-state subsidiaries. Provides safe harbor for transactions, plans and arrangements that initiated before April 1, 2010, or are in conformance with written instructions, published determinations, or other DOR documents. Directs DOR to study the taxation of intercompany transactions.

--- END ---